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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,
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13 vs. Plaintiff,
14 BRENT ROGER WILKES,
15 Defendant.
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CASE NO. 07cr0330-LAB

**ORDER DENYING DEFENDANT'S
APPLICATIONS FOR RULE 17
SUBPOENAS**

[Doc. Nos. 160, 169]

18 **INTRODUCTION**

19 Defendant Brent Roger Wilkes has filed two applications for court authorization to
20 issue subpoenas for 20 prospective witnesses pursuant to Rule 17(b) and (c) of the
21 Federal Rules of Criminal Procedure. The list of prospective witnesses Wilkes seeks to
22 examine include several news reporters, the United States prosecutors who were
23 assigned to prosecute the case against him, a former United States Attorney for this
24 judicial district, and a current United States Attorney for another judicial district and his
25 Executive Assistant. The application is opposed by two of the reporters and by the United
26 States. Having considered the pleadings and the relevant legal authorities, the Court
27 **SUSTAINS** the objections and **DENIES** Wilkes' application for the issuance of
28 subpoenas.

BACKGROUND

The request for Rule 17 subpoenas in this case stems from a criminal investigation into the bribing of former United States Congressman Randy “Duke” Cunningham. Cunningham pled guilty to accepting bribes in 2005 and was sentenced to prison. The investigation of the matter continued through 2007, and culminated in an indictment issued on February 13, 2007 charging Wilkes and John T. Michael with conspiracy, honest services wire fraud, and bribing Cunningham, among other crimes.

Before the indictment issued February 13, at least three newspaper articles were published identifying Wilkes as a target of the grand jury probe and predicting he would soon be indicted. For example, an article written by Scot Paltrow appeared in *The Wall Street Journal* on January 19, 2007.¹ Mr. Paltrow identified Mr. Wilkes as “a key figure in the case” who had “become the focus of the investigation,” and noted “[p]eople with knowledge of that investigation said prosecutors are bringing last-minute witnesses before a grand jury and expect Mr. Wilkes will be indicted early next month.”

A second wire service article detailing allegedly leaked grand jury information was published in the *North County Times* on January 31, 2007.² That article quoted two unnamed federal officials saying “the U.S. Attorney’s Office in San Diego is close to seeking an indictment against Poway defense contractor Brent Wilkes, who allegedly bribed Randy ‘Duke’ Cunningham in return for millions of dollars in government contracts....” The source of the information, the article reported, was someone “with intimate knowledge of the case” who “spoke on the condition of anonymity.” According to the newspaper’s source, a preliminary draft indictment had been circulated and was under review “by many eyes....”

A third wire service article written by reporter Allison Hoffman of the Associated Press appeared on February 1, 2007.³ Ms. Hoffman wrote:

¹ The *Wall Street Journal* article is attached as Exhibit H to the government’s opposition.

² The *North County Times* article is attached as Exhibit I to the government’s opposition.

³ The February 1, 2007 wire service article by Ms. Hoffman is attached as Exhibit J to the government’s opposition. The article also revealed that a second indictment charging Mr. Wilkes and Kyle “Dusty” Foggo with conspiracy and honest services wire fraud was imminent. Approximately two weeks later, on the same day the indictment in this case was returned, an indictment charging Wilkes and Foggo was also returned (*United States*

1 Federal prosecutors are preparing to seek indictments against ... a
 2 San Diego defense contractor linked to the bribery scandal that sent
 3 former U.S. Rep. Randy "Duke" Cunningham to prison, two
 4 government officials familiar with the investigation said Wednesday.

5 The officials, who spoke to The Associated Press only on the
 6 condition of anonymity because grand jury proceedings are secret
 7 and the charges have not been finalized, said prosecutors plan to
 8 ask a San Diego grand jury to return charges of honest services wire
 9 fraud and conspiracy against ... Brent Wilkes.

10 * * * *

11 The officials said [an] indictment is being prepared that would charge
 12 Wilkes and two other alleged Cunningham co-conspirators – New
 13 York businessman Thomas Kontogiannis and his nephew, John T.
 14 Michael – with bribery and several conspiracy counts.

15 The indictments are likely to be returned within the next few weeks,
 16 the officials said.

17 After the indictment against Mr. Wilkes and Mr. Michael was returned, Mr. Wilkes'
 18 counsel, Mark Geragos, alerted the Court to the apparent grand jury leaks and sought a
 19 hearing to determine the identities of the leakers [See Transcript, March 19, 2007, at 41].
 20 The Court agreed at the time to entertain the motion, [*id.*], but thereafter no written motion
 21 was filed. Several month later, and shortly before the scheduled trial date, Mr. Geragos
 22 made a second oral motion renewing his request for a hearing to determine whether the
 23 alleged grand jury leaks might justify dismissal of the indictment against his client, or
 24 some other sanction against the government. The Court reiterated its willingness to
 25 consider the motion, but deferred scheduling a hearing on the matter because the trial
 26 date was imminent. Mr. Wilkes was subsequently tried and convicted by a jury on all
 27 counts of the indictment.

28 Before a jury was impaneled to hear this case, each prospective juror was
 individually prescreened by the court and the parties for exposure to pretrial publicity. All
 prospective jurors completed an extensive 18-page questionnaire asking whether they
 had read anything about the case, whether they knew or had formed an opinion about

v. Kyle Dustin Foggo and Brent Roger Wilkes, Crim. No. 07CR00329-LAB). However, even if government
 officials leaked grand jury information pertaining to the Wilkes-Foggo indictment, it is not apparent how
 misconduct associated with that case would provide a basis for granting a new trial or dismissing the indictment
 in this case.

1 any of the participants in the trial, and whether they held any opinion that Wilkes was
 2 either guilty or innocent. In addition, before the jury was finally impaneled in this case, all
 3 prospective jurors were personally questioned by the court and counsel regarding
 4 whether they had been exposed in advance to any aspect of the case. Of the fifteen
 5 people who were ultimately chosen by the parties to hear the case, only four had read or
 6 heard anything about it. None had read the aforementioned articles. Presumably for this
 7 reason, following voir dire neither Wilkes nor the government attempted to challenge any
 8 prospective juror on the ground of exposure to pretrial publicity.

9 Mr. Wilkes now renews his request for a hearing into the alleged grand jury leaks.
 10 He contends the government willfully and deliberately violated the grand jury secrecy
 11 obligations imposed by Rule 6(e) of the Federal Rules of Criminal Procedure. He argues
 12 that leaking information to the press and public about his case while it was still being
 13 considered by the grand jury and before any indictment was returned, amounted to
 14 outrageous government conduct which now justifies setting aside the jury's guilty verdicts.

15 The government objects to Wilkes' application for subpoenas, taking the position
 16 the Court should summarily deny the application because Wilkes cannot show he was
 17 prejudiced by the grand jury leaks.⁴ Seemingly unconcerned by the near-certainty that
 18 information relating to a pending grand jury investigation was leaked by one or more
 19 government agents in this case, government prosecutors argue that "further judicial
 20 inquiry into the circumstances of the alleged leaks is not appropriate at this time."
 21 [Government Opposition at 20].⁵

22 ⁴ This response represents a change of position on the part of the government. When the issue was first raised
 23 by Wilkes' counsel at the hearing on March 19, the government prosecutor, Mr. Forge, said "Your honor, I want
 24 to make clear to the court ... the leaks of the information to the press were absolutely reprehensible and
 completely inexcusable." When asked by the Court whether the government was investigating the leaks, Mr.
 Forge responded:

25 I'm not in a position to disclose that in open court, but I will state that nothing
 26 would please me more than to determine who is responsible for that and get them
 27 in front of this court to be held accountable for having done that. It's
 embarrassing. It's reprehensible and inexcusable.

28 ⁵ In its opposition, the government makes a curious allusion to the prospect of a "potential leak investigation
 conducted by the Department of Justice." [Government Opposition at 20, n.12.]. The allusion is curious because
 the Court was informed by a letter dated June 14, 2007, from Carolyn Delaney, Executive Assistant United

Two of the reporters that Wilkes seeks to subpoena, Ms. Hoffman and Ms. Lisa Myers, a journalist with NBC News, also object to Wilkes' application and effort to subpoena them. The reporters argue, among other things, that the testimony and information Wilkes seeks from them is protected under the First Amendment and by the California newsreporter shield law. They also adopt and reiterate the principal argument advanced by the government – that because Wilkes cannot show prejudice, a hearing to ascertain who leaked grand jury information is pointless.

ANALYSIS

The starting point in the Court's analysis is the ostensible authority for Wilkes' application for subpoenas, Federal Rule of Criminal Procedure 17. That rule instructs the Court to issue subpoenas for witnesses or documents and objects sought by an indigent defendant when necessary for the defendant to mount an adequate defense.⁶ Subsection (b) of Rule 17 governs witness subpoenas; subsection (c) pertains to requests for documents and objects. Wilkes has requested that subpoenas issue for both.

Rule 17 requires that a subpoena be issued when it is shown what is sought is necessary to present an adequate defense. The burden of proving "necessity" rests with the defendant. *United States v. Smith*, 924 F.2d 889, 896 (9th Cir. 1991). Therefore, Wilkes must establish, as a threshold matter, how the witnesses and documents he seeks to subpoena are relevant and necessary to his defense. Failing to set forth the expected testimony of the proposed witnesses, or otherwise failing to demonstrate how the testimony, documents or objects will likely be relevant and useful to the defense of the

States Attorney for the Eastern District of California, that the Department of Justice had already concluded "no further investigation of the [grand jury leaks] is warranted." Ms. Delaney reached this conclusion within 14-days of being appointed by the Department of Justice to investigate the leaks. Remarkably, she quickly jettisoned the notion that further investigation was necessary without personally interviewing any of the percipient witnesses, and notwithstanding the concession made by one of the assigned trial prosecutors that "embarrassing," "inexcusable," and "reprehensible" leaking of grand jury information had occurred in this case.

⁶ Although Mr. Wilkes was represented initially by retained counsel, the Court has since granted his application for appointed counsel upon finding he is presently indigent. The Court appointed Federal Defenders of San Diego to represent Mr. Wilkes in a second criminal case in which he is charged with Mr. Foggo. The Court also provisionally appointed Federal Defenders to assist in Mr. Wilkes' defense in this case.

1 case, is grounds for denying the request for subpoenas under Rule 17(b) and (c). *United*
2 *States v. Hernandez-Urista*, 9 F.3d 82, 84 (10th Cir. 1993).

3 The nature and timing of the hearing in connection with which the witnesses'
4 testimony is sought informs the issue in this case. Having been convicted by a jury,
5 Wilkes must now show the fairness of his trial was prejudiced by the grand jury leaks. In
6 other words, for the expected testimony to be relevant to Wilkes' defense at this stage of
7 the proceedings, he has to demonstrate it will provide the basis for granting him a new
8 trial or dismissing the indictment against him altogether.

9 Making such a showing, post-trial, is difficult – if not impossible – unless it can be
10 shown the jury was somehow affected or prejudiced. At least two federal courts of appeal
11 have held that prejudicial pretrial publicity does not provide a basis for dismissing an
12 indictment once the defendant has been tried by a petit jury that was untainted by the
13 publicity. See *United States v. Waldon*, 363 F.3d 1103 (11th Cir. 2004) (per curiam);
14 *United States v. Brien*, 617 F.2d 299 (1st Cir. 1980). Unfortunately for Wilkes, that is
15 exactly the situation here. The jury that decided this case was extensively prescreened by
16 the court and the parties for exposure to pretrial publicity. Through his counsel, Wilkes
17 availed himself of the opportunity to personally and individually question prospective trial
18 jurors about whether they had heard or read about the case. As it turned out, only 4 of the
19 15 jurors who were impaneled had heard about the case. None had read any of the
20 articles forecasting Wilkes' indictment and the likely charges. Undoubtedly, this is why
21 Wilkes did not seek to excuse any of the prospective trial jurors for cause after voir dire
22 on the ground of exposure to pretrial publicity.

23 The concern raised by adverse publicity is how it affects the ensuing trial, not the
24 grand jury proceedings. *Waldon*, 363 F.3d at 1109. Here, Wilkes makes no contention
25 that the petit jury that convicted him was at all influenced or affected by information that
26 was improperly leaked before the indictment issued. That being so, no legal basis exists
27 for granting a new trial predicated on allegations of such improper leaking. The verdicts
28 returned by an impartial trial jury in this case vitiated any possible prejudice caused by the

1 grand jury leaks. Necessarily then, eliciting testimony from witnesses that will possibly
 2 reveal who leaked information about the impending charges will simply not be relevant to
 3 any defense Wilkes might mount at this stage of the proceedings. Nor, then, can it be
 4 said such testimony is “necessary” in the Rule 17 sense to any legal remedy Wilkes has
 5 available.

6 While this Court shares Wilkes’ concern that the breach of grand jury secrecy in
 7 this case was improper and a likely violation of Rule 6,⁷ violation of grand jury secrecy
 8 rules does not, of itself, justify dismissing the indictment. The purposes served by grand
 9 jury secrecy are well known, and include: encouraging prospective witnesses to come
 10 forward and testify fully and frankly without improper influence in the form of threats or
 11 promises; preventing targets of grand jury investigation from being alerted to the scrutiny
 12 and fleeing or attempting to influence grand jurors or witnesses; and insuring those
 13 investigated but not indicted are saved from “public ridicule.” *Douglas Oil Co. v. Petrol*
 14 *Stops NW*, 441 U.S. 211, 218-19 (1979). These concerns become much less compelling
 15 when, as happened here, the grand jury returns an indictment. See *id.* at 218-19, 222
 16 (interest served by grand jury secrecy reduced after indictment); 1 Wright, Federal
 17 Practice and Procedure, § 106, at 365-66 (3d ed. 1999). Because the Court finds Wilkes
 18 was not prejudiced by the grand jury leaks, ordering dismissal of the indictment would
 19 have the effect of granting him an undeserved windfall. See *Bank of Nova Scotia v.*
 20 *United States*, 487 U.S. 250, 263 (1988) (remedy for misconduct by government agents
 21 should focus “on the culpable individual rather than granting a windfall to the unprejudiced
 22 defendant”).

23 Putting aside that Wilkes was not prejudiced by the improper leaking of matters
 24 before the grand jury, the Court has considered the alternative of relying on its

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 26 ⁷ It is suggested by one of the reporters opposing the application for subpoenas that the disclosures in this case
 27 may not have technically violated Rule 6(e) since the information largely related to the intentions of the
 28 prosecutors rather than the substance of any grand jury proceeding. [Hoffman Opposition at 10]. The Court
 rejects such a narrow reading of Rule 6. Given the concerns underlying the requirement of grand jury secrecy,
 it was improper for any government agent with knowledge of the proceedings to leak information identifying Mr.
 Wilkes as the target of the grand jury investigation and to forecast the likely charges and timetable for the
 indictment.

1 supervisory power to authorize the issuance of the subpoenas, if only to vindicate the
2 public and institutional interests in grand jury secrecy. Clearly, the public interest was at
3 least temporarily compromised in this case by the irresponsible and illegal actions of one
4 or more government agents who leaked secret grand jury information to news reporters.
5 In the end, however, separation of powers constraints counsel against the Court
6 launching its own investigation into the source of the leaks. See *In re U.S.*, 441 F.3d 44,
7 58-59 (1st Cir. 2006) (court should ordinarily refrain from conducting its own investigations
8 and refer instances of grand jury misconduct to the Department of Justice for
9 investigation and prosecution). The remedial and supervisory powers of the Court remain
10 limited, even when it appears the “investigation” by the responsible authority has been
11 conducted in a slipshod manner with seeming indifference to the concerns giving rise to
12 the rule of grand jury secrecy. See footnote 5.

13 CONCLUSION

14 Summing up, the Court finds that Wilkes was not prejudiced by the alleged
15 government misconduct in this case, and that it had no material affect on the verdict. He
16 is therefore not entitled to a new trial, or to have the indictment dismissed. See *United*
17 *States v. Sarkisian*, 197 F.3d 966, 988 (9th Cir. 1999) (where motion for new trial is
18 predicated on allegations of government misconduct, defendant must show that
19 misconduct materially affected the verdict). Because Wilkes cannot show he was
20 prejudiced – and is therefore foreclosed from seeking a new trial or dismissal on the
21 ground of government misconduct – the Rule 17 subpoenas he has requested cannot
22 possibly be necessary to any legal defense he may mount at this stage. Accordingly, the
23 objections lodged by the United States and by reporters Hoffman and Myers to the
24 issuance of the Rule 17 subpoenas are **SUSTAINED**. For the same reasons, the Court

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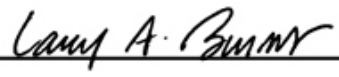
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1 declines to authorize subpoenas for any other prospective witness identified in Wilkes'
2 applications.⁸

3 **IT IS SO ORDERED.**

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5 DATED: December 3, 2007

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7 **HONORABLE LARRY ALAN BURNS**
8 United States District Judge
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27 ⁸ Because the Court has determined that Wilkes cannot meet his burden of establishing "necessity" under Rule
28 17, it does not consider the reporters' arguments that the information sought from them is protected by the First Amendment or by a privilege. The Court notes, however, that the very same arguments were recently considered by the United States District Court for the Northern District of California and rejected. *See In re Grand Jury Subpoenas to Mark Fainaru-Wada and Lance Williams*, No. CR 06-90225-JSW (N.D. Cal. 2006).